174

No. 10-150

Supreme Court, U S
FILED
NOV - 5 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BRUCE CARNEIL WEBSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

STEVEN J. WELLS
Counsel of Record
GRETCHEN A. AGEE
DORSEY & WHITNEY LLP
50 S. Sixth Street, Suite 1500
Minneapolis, MN 55402
(612) 340-2600
wells.steve@dorsey.com

Counsel for Petitioner

Nov. 5, 2010

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. THIS COURT HAS JURISDICTION TO CONSIDER THIS PETITION, AND SHOULD GRANT TO RESOLVE ITS POWER OF REVIEW 2

II. THE MEANING OF SECTION 2255(h) PRESENTS VITALLY IMPORTANT QUESTIONS WHICH THIS COURT SHOULD RESOLVE 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Babbitt v. Woodford, 177 F.3d 744 (9th Cir.), *cert. denied*, 526 U.S. 1107 (1999) 12

Burris v. Parke, 116 F.3d 256 (7th Cir. 1997) 11

Castro v. United States, 537 U.S. 1170 (2003) 2

Castro v. United States, 540 U.S. 375 (2003) 3, 7

Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir.), *cert. denied*, 519 U.S. 1102 (1997) 12

Holland v. Florida, 130 S. Ct. 2549 (2010) 10

In re Medina, 109 F.3d 1556 (11th Cir. 1997) 11

Landrigan v. Brewer, ___ F.3d ___, 2010 WL 4260105 (9th Cir. Oct. 26, 2010) 12

McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991) 3

Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Protection, 474 U.S. 494 (1986) 9

Rhines v. Weber, 544 U.S. 269 (2005) 12

Sawyer v. Whitley, 505 U.S. 333 (1992) ..... *passim*

Slack v. McDaniel, 529 U.S. 473 (2000) 10

Thompson v. Calderon, 151 F.3d 918 (9th Cir.), *cert. denied*, 524 U.S. 965 (1998) 11, 12, 13

United States v. Ruiz, 536 U.S. 622 (2002) 3

Utah v. Evans, 536 U.S. 452 (2002) 3

Webster v. United States, No. 4:00-CV-1646, 2003 WL 23109787 (N.D. Tex. Sept. 30, 2003) 1

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220 5

AEDPA, Pub. L. No. 104-132, § 106(a), 110 Stat. 1220 5

18 U.S.C. § 3591 8

18 U.S.C. § 3593 8

18 U.S.C. § 3596 8

28 U.S.C. § 1254 4

28 U.S.C. § 2244 ..... *passim*

28 U.S.C. § 2254 ..... 5, 6

28 U.S.C. § 2255 ..... *passim*

REPLY BRIEF FOR PETITIONER

This case presents the Court with important and recurring jurisdictional questions in the stark context of a federal capital case: Does this Court have the power to review a lower federal court's determination that it cannot even "entertain" a federal prisoner's claim of categorical ineligibility for the death penalty? If so, was the court of appeals wrong to conclude that it is statutorily deprived of jurisdiction to hear that claim because the newly discovered evidence in that claim challenges eligibility for the death sentence and not guilt? And if it was not wrong, is that statute, so construed, a deprivation of due process and an infliction of cruel and unusual punishment on the mentally retarded?

Petitioner does not seek to challenge his guilt for the underlying crime,[1] but he does seek to challenge the execution of an unconstitutional punishment. Properly read, the statutory language permits the courts to consider such a challenge, which would be meritorious here. Although this Court is not asked to decide the "merits" of that challenge, but instead to

---

[1] The government's recitation of its view of the background facts is thus entirely irrelevant to the questions actually presented. It may be noted, nonetheless, that there is significant evidence Petitioner was largely a follower of others, *see Webster v. United States*, No. 4:00-CV-1646, 2003 WL 23109787, at *7 (N.D. Tex Sept 30, 2003), and that even the government's recitation does not claim he acted without others in committing the crime. *See* Gov't Opp'n at 2-4.

remand it to the Fifth Circuit for determination, the Court can certainly take note of what the concurrence below candidly acknowledged: that the newly discovered evidence Petitioner seeks to present would "virtually guarantee[ ]" a finding of mental retardation and thereby prevent an "unconstitutional punishment." Pet. App. 9a, 12a.[2] This case is thus a compelling vehicle by which to review the important questions presented.

I. THIS COURT HAS JURISDICTION TO CONSIDER THIS PETITION, AND SHOULD GRANT TO RESOLVE ITS POWER OF REVIEW.

The question of whether this Court "ha[s] jurisdiction to review the [court of appeals'] decision affirming the dismissal of a § 2255 petition for writ of habeas corpus as second or successive" has already been recognized as important: in *Castro v. United States*, 537 U.S. 1170 (2003), this Court *sua sponte* directed the parties to address that question in their merits briefs. That the *Castro* Court ultimately did

---

[2] The government's argument that Petitioner's newly discovered evidence would not show that he is mentally retarded is unfounded. There is nothing in the record to support the government's speculation that, for example, the newly discovered pre-crime diagnoses of mental retardation were the result of physical (rather than mental health) evaluations, or that Petitioner's low IQ scores were "self-reported." But such fact issues are for the Fifth Circuit on remand and do not affect the purely legal questions presented to this Court.

not need to reach the issue, finding jurisdiction on other grounds, 540 U.S. 375, 379-81 (2003), does not detract from its importance, and it is now squarely presented again.

Rather than quarrel with the importance of the jurisdictional question, the government makes a merits argument that AEDPA restricts this Court's review.[3] But there is no such express prohibition in Section 2255, and this Court's normal practice is to read jurisdiction-withdrawing provisions narrowly. *See Utah v. Evans*, 536 U.S. 452, 463 (2002). Congress is presumed to know this Court's normal interpretive practice, *see McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991), and could have expressly stated in Section 2255 that court of appeals' certification decisions relating to applications brought by federal prisoners are unreviewable, but it did not.

Nor did Congress expressly incorporate into Section 2255 the Section 2244(b)(3)(E) restriction on this Court's ability to review a court of appeals' denial of a *state* prisoner's application for certification. Instead, Congress explicitly provided that only those provisions in Section 2244 *providing for certification* of the petition *by the court of appeals* would apply to federal prisoners proceeding under Section 2255:

---

[3] Of course, this Court has jurisdiction to consider the jurisdictional question, since it is well-established that this Court "always has jurisdiction to determine its own jurisdiction." *E.g.*, *United States v. Ruiz*, 536 U.S. 622, 628 (2002).

"[a] second or successive motion must be *certified* as provided in section 2244 *by a panel of the appropriate court of appeals*." 28 U.S.C. § 2255(h) (emphasis added). Congress did not incorporate every aspect of Section 2244, but instead only those parts that "provide[ ]" for "certifi[cation] . . . by a panel of the . . . court of appeals." *Id.* Congress said nothing about incorporating restrictions on *review by this Court* of a court of appeals' certification decision. And when Congress explicitly says nothing about withdrawing review jurisdiction, the usual interpretive rule in favor of the jurisdiction expressly granted by 28 U.S.C. § 1254(1) applies.

As the government notes, Congress intended for a panel of the appropriate court of appeals to decide whether a prisoner – state or federal – can bring a second or successive habeas petition, and Petitioner's requested relief does not disturb that procedure. Petitioner does not seek, as the government claims, "an order by this Court that his successive collateral attack be certified as permissible." Gov't Opp'n at 13. Rather, Petitioner asks this Court to overrule the Fifth Circuit's determination that it lacked jurisdiction even to "entertain" the application for the successive motion in the first instance. Thus, if the Court grants the petition and decides in favor of Petitioner here, the relief would be a remand for the Fifth Circuit to determine, in the first instance, whether the newly discovered evidence meets the substantive requirements set forth in Section 2255(h)(1).

The government's reference to the "text and structure" of AEDPA, *see* Gov't Opp'n at 13-14, in fact contradicts its own conclusion that Section 2244 should be applied wholesale to federal prisoners bringing motions under Section 2255. Among other things, AEDPA placed the requirements for a successive petition brought by a federal prisoner in a separate section from the requirements for a successive petition brought by a state prisoner. In particular, the amendment to Section 2255 added subpart (h), which sets forth the requirement that the second or successive motion "be certified as provided in section 2244 by a panel of the appropriate court of appeals" and states the substantive standard for that certification for a federal prisoner. *See* AEDPA, Pub. L. No. 104-132, § 105, 110 Stat. 1220. At the same time, Congress removed the language in Section 2244(a) which had set forth the standard for a second or successive motion brought by a federal prisoner, and instead expressly stated that Section 2255 now provides the substantive standard for such a motion. *See* AEDPA § 106(a). Section 2244(b)(3)(E), the restriction on *review* of the court of appeals' certification decision, was added only to the state prisoner section.

Collectively, these changes indicate a congressional intent to treat successive motions brought by state and federal prisoners differently, as other provisions in Sections 2244, 2254 and 2255 further confirm. *E.g.*, *compare* 28 U.S.C. § 2244(b)(2), *with* 28 U.S.C. § 2255(h) (imposing different substantive requirements on the showing required for certification);

compare 28 U.S.C. §§ 2244(b)(1)-(2) (requiring dismissal of a successive state claim that had been raised before and requiring the exercise of due diligence for a state claim that was not raised before), *with* 28 U.S.C. § 2255(h) (no similar requirements). While some finality concerns are similar, and thus there are similar (though not identical) high bars against second or successive petitions in each section, Congress still had good reason to treat federal and state prisoners differently in light of the federalism concerns that are only raised when federal courts review state court judgments. One need only look to the provisions requiring specific deference to prior state court determinations, *see, e.g.*, 28 U.S.C. § 2254(e), for which there are no federal parallels, *see, e.g.*, 28 U.S.C. § 2255(b). It is thus logical to conclude that Congress intended different review procedures to apply to certification decisions regarding state and federal prisoners, especially when, as shown above, such an interpretation comports with the plain language of the statute.

But in any event, all that involves the merits of the jurisdictional question regarding this Court's power to review Section 2255 decisions, which the Court should grant to answer. This case also concerns the Fifth Circuit's interpretation of the meaning of the statute regarding the Fifth Circuit's own jurisdiction. As to that question, even if the Court were to determine that Section 2244(b)(3)(E)'s bar to its review applies to federal as well as state prisoners, the Court would still separately have the power, as in

Castro, to determine whether the Fifth Circuit correctly interpreted the statutory language in Section 2255(h)(1). Contrary to the government's argument, that statutory interpretation question, rather than the resulting "denial" of authorization, is the "subject" of this petition to this Court.[4] Accordingly, for this reason as well, the Court has jurisdiction to consider the petition, and should grant to do so.

II. THE MEANING OF SECTION 2255(h) PRESENTS VITALLY IMPORTANT QUESTIONS WHICH THIS COURT SHOULD RESOLVE.

Again arguing the merits rather than disputing the importance of the issue, the government contends that Congress's use of the word "offense" in Section 2255(h)(1) "plainly excludes challenges to sentences, including death sentences." Gov't Opp'n at 18. But the government's argument relies on the improper

---

[4] Tellingly, the government never addresses the fact that the Fifth Circuit itself went out of its way to add a footnote explaining it was making a jurisdictional ruling and was not denying the application on its merits:

> Our decision that the instant motion is beyond the reach of § 2255 is jurisdictional in nature, going to the ability of the district court and this court to entertain the § 2255 motion in the first instance The result makes it unnecessary for this court to address whether, as the government claims, the evidence that Webster seeks to introduce is neither newly discovered nor substantive.

Pet. App. 8a, n 8.

conclusion that there are only two determinations that make up a capital trial: guilt and sentencing. As this Court recognized in *Sawyer v. Whitley*, however, there are *three* determinations: guilt, *eligibility*, and sentence selection. 505 U.S. 333, 341-43 (1992). *Eligibility* is intrinsically entwined with the crime that is charged. It is *death eligibility* that makes an underlying crime a "capital" crime; the exact same set of facts can be charged as a non-capital crime (if, for example, the defendant is a juvenile). Indeed, by statute, a federal case such as this one becomes a "capital" case when the U.S. Attorney separately provides notice, before trial or plea, that he "believes that the circumstances of the offense are such that a sentence of death is justified under this chapter," 18 U.S.C. § 3593(a), not merely that he believes the elements of the underlying offense, such as a kidnapping involving a death, are present. Included in "this chapter" (Title 18, Part 2, Chapter 228) and thus among the factors to be considered by the U.S. Attorney in determining whether the death penalty "is justified," is Section 3596(c), which expressly provides that a "sentence of death shall not be carried out upon a person who is mentally retarded."[5] It is thus

---

[5] Also included in "this chapter" is the provision that expressly prohibits the carrying out of a sentence of death on a juvenile 18 U.S.C. § 3591(a). As the government acknowledges, its interpretation of Section 2255(h)(1) would also bar any successive claim by a federal prisoner who has conclusive evidence that he was 16 at the time of the crime Gov't Opp'n at 28-29.

entirely plausible that when Congress said "guilty of the offense" in Section 2255 (and not merely "guilty of the *underlying* offense" as it did in Section 2244), it intended to encompass the determination of *eligibility* – i.e., that which makes an offense "capital."[6]

Such an interpretation of the statutory language comports with the pre-AEDPA concept of "actual innocence" of the death penalty and avoids the constitutional difficulties (noted in the third question presented) raised by the government's version. The government hypothesizes that Congress could have used the phrases "fundamental miscarriage of justice" or "actual innocence" to demonstrate its intent to codify the pre-AEDPA law on successive petitions, but that is not the interpretative analysis this Court uses. Instead, "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986). Here, given the three-part nature of federal capital prosecutions, the binary ("offense" and "sentence") language of AEDPA is at worst ambiguous, and certainly does not foreclose continued application

---

[6] The government's argument that because a defendant has the burden to prove mental retardation, the fact of mental retardation does not go to "guilt" of the "offense" is nonsensical. *See* Gov't Opp'n at 21 No one would argue that an insane person is "guilty of the offense," even though the defendant bears the burden of proving his insanity.

of the pre-AEDPA concepts of "fundamental miscarriage of justice" or "actual innocence." Moreover, this Court has recognized that AEDPA does not "undermin[e] basic habeas corpus principles" and seeks "to harmonize the new statute with prior law." *Holland v. Florida,* 130 S. Ct. 2549, 2562 (2010); *see also Slack v. McDaniel*, 529 U.S. 473, 483 (2000) ("AEDPA's present provisions . . . incorporate earlier habeas corpus principles."). The Court should take this case to resolve that ambiguity and to rule that "actual innocence of the death penalty" is still an available exception to what would otherwise be a "second or successive" bar.[7]

Contrary to the government's contention, the question of whether Congress intended to retain the concept of "actual innocence" within AEDPA has divided and confused the lower courts. The government argues there is no circuit split because the Ninth Circuit "is in accord with every appellate decision considering comparable circumstances," Gov't Opp'n at 18, but does not note for this Court that the Ninth Circuit expressly said it "disagree[d] with the Seventh and Eleventh Circuit decisions rejecting a petitioner's claim of innocence of the death

---

[7] It is no answer to say, as the government does, that there are other avenues one "actually innocent of the death penalty" might pursue, such as a plea for executive clemency or an original writ in this Court. Those possibilities were also "available" when *Sawyer* was decided, but they did not affect this Court's holding.

penalty as not cognizable under § 2244(b)(2)(B)." *Thompson v. Calderon*, 151 F.3d 918, 924 n.14 (9th Cir.), *cert. denied*, 524 U.S. 965 (1998) (citing *In re Medina*, 109 F.3d 1556, 1565-66 (11th Cir. 1997); *Burris v. Parke*, 116 F.3d 256, 258 (7th Cir. 1997)).

The holding in *Thompson* is broader than the government's claim that it only allows a petitioner to argue he is innocent of a special circumstance that is a necessary part of capital murder. In *Thompson*, the Ninth Circuit concluded that Congress intended to codify the "innocence of the death penalty" standard from *Sawyer*, 151 F.3d at 923-24, and in *Sawyer* this Court concluded that "innocence of the death penalty" had a "more expansive meaning . . . than simply innocence of the capital offense itself." 505 U.S. at 343. Rather, *Sawyer*'s "innocence of the death penalty" standard focused on the petitioner's *eligibility* for a capital sentence, requiring a petitioner to show by clear and convincing evidence that, but for constitutional error, "no reasonable juror would have found the petitioner to be *eligible for the death penalty*. . . ." 505 U.S. at 336 (emphasis added). The Court concluded, "[s]ensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance *or that some other condition of eligibility had not been met*." *Id.* at 345 (emphasis added). By holding that § 2244(b)(2)(B) codifies the *Sawyer* standard, the *Thompson* court held that even the narrower phrase "guilty of the underlying offense" encompasses a

claim that a petitioner is ineligible for a capital sentence. Though decided in 1998, *Thompson* has recently been followed in the Ninth Circuit. *See Landrigan v. Brewer*, ___ F.3d ___, 2010 WL 4260105, at *10 n.5 (9th Cir. Oct. 26, 2010) (reaffirming *Thompson* and entertaining a successive application solely challenging the petitioner's eligibility for a death sentence).

The other Ninth Circuit cases cited by the government do not alter the holding in *Thompson* nor the existence of the circuit split. In *Babbitt v. Woodford*, 177 F.3d 744, 748 (9th Cir.), *cert. denied*, 526 U.S. 1107 (1999), the Ninth Circuit, unlike the Fifth Circuit here, decided in dicta it *could* entertain defendant's claim, even though it concluded the newly discovered evidence did not establish actual innocence of either the crime or the special circumstance findings that made defendant eligible for the death penalty. In *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir.), *cert. denied*, 519 U.S. 1102 (1997), *abrogated on other grounds by Rhines v. Weber*, 544 U.S. 269 (2005), the Ninth Circuit held, consistent with *Thompson* and *Sawyer*, that the phrase "guilty of the underlying offense" did not encompass an ineffective assistance of counsel claim that petitioner's counsel had inadequately presented evidence of mitigating circumstances at the sentencing stage. In this case, of course, the fact of mental retardation is not mitigating evidence, but a circumstance that makes the petitioner categorically ineligible for the death penalty in the first place. As the Ninth Circuit

itself acknowledged in *Thompson*, there is disagreement among the circuits over whether AEDPA encompasses a claim such as Petitioner's here, and this Court should now resolve that confusion.

CONCLUSION

For the foregoing reasons, and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN J. WELLS
Counsel of Record
GRETCHEN A. AGEE
DORSEY & WHITNEY LLP
50 S. Sixth Street, Suite 1500
Minneapolis, MN 55402
(612) 340-2600
wells.steve@dorsey.com

Counsel for Petitioner

Nov. 5, 2010